

Roska and the Warrant Requirement in Utah Child Protection Law

by John E. Laberty

In April of 2003, the Tenth Circuit Court of Appeals decision *Roska ex rel. Roska v. Peterson, et al.* bestowed upon Utah parents unprecedented legal protection against the removal of their children by state social workers.¹ Prior to the decision, Utah's child welfare laws authorized DCFS to remove a child from his or her home without a warrant, and without providing the parent with any pre-removal due process, whenever there was "a substantial danger to the physical health or safety of the minor" justifying removal. When an employee of the Utah Division of Child and Family Services ("DCFS") felt this standard was met, the removal process was a relatively simple one. The worker staffed the case with other DCFS personnel, ran the facts by the Division's legal counsel at the Attorney General's office, and, if the general consensus supported removal, the worker removed the child from the home. The State was not required to obtain prior judicial approval, nor were parents provided an opportunity to contest the removal beforehand. Instead, Utah law only afforded judicial review of the agency's decision – a "shelter hearing" in juvenile court – within seventy-two hours *after* the child had been taken into the State's custody. *Roska* put an end to this process in the vast majority of child welfare cases, on two separate constitutional grounds.

The *Roska* Decision

In *Roska*, parents and siblings of a Utah child removed by DCFS brought a §1983 civil rights lawsuit alleging, among other claims, that DCFS and the Attorney General's Office had violated their rights by removing the child without a warrant. In reviewing the trial court's dismissal of the suit on immunity grounds, the *Roska* court applied the Fourth Amendment's warrant requirement to child welfare cases and held that, absent exigent circumstances, state child protection workers could not legally remove a child from his or her home without a warrant. The court stated:

We find no special need that renders the warrant requirement impracticable when social workers enter a home to remove a child, absent exigent circumstances.... Simply put, *unless the child is in imminent danger*, there is no

reason that it is impracticable to obtain a warrant before social workers remove a child from the home.

328 F.3d at 1242. The Court reiterated the well-established principle that the exigent circumstances exception to the warrant requirement "is narrow, and must be 'jealously and carefully drawn.'" *Id.* at 1240 (*quoting U.S. v. Anderson*, 154 F.3d 1225, 1233 (10th Cir. 1998)). Indeed, the *Roska* court held that even a social worker's decision to seek legal advice prior to removing a child negated the existence of exigent circumstances, and made proper removal contingent on a warrant. *Id.* at 1242.

Second, the Court ruled that in order to protect a parent's Fourteenth Amendment due process right to maintain his or her family free from state government interference, the State could not remove a child from his home without first providing the parents with notice and a hearing. While an exception was made for "extraordinary situations," the Court narrowly defined such situations as "emergency circumstances," such as where there is "*an immediate threat to the safety of a child.*" *Id.* at 1245.

Utah Law After *Roska*: 3 Paths to Removal

The Utah Legislature amended the state's child removal laws to conform to *Roska* and, as of May 2003, Utah law prohibits the State from removing a child without a warrant unless "exigent circumstances" exist. *Utah Code* § 62A-4a-202.1.² Further, the court may not issue a removal warrant without first providing the child's parent with notice and an opportunity to be heard, unless providing such notice and opportunity would place the child in immediate risk of harm. *Utah Code* §78-3a-106(2).

Interestingly, while the *Roska* court limited its Fourth Amendment

JOHN E. LAHERTY is an attorney at Lokken & Associates, P.C.. Mr Laberty has over nine years experience practicing child protection law in Utah's juvenile courts.



holding to the facts before it – namely, where a child is removed from his or her *physical home* – Utah’s legislature declined to do so. Instead, Utah law now appears to require a warrant whenever a child is taken into custody absent exigent circumstances regardless of where the removal physically occurs.

Path 1: Exigent Circumstances, No Warrant

The practical effect of these laws is to create three distinct categories of removals. First, there are those cases in which “exigent circumstances” exist, such that the delay required to obtain a warrant is likely to result in serious harm to the child. In such cases, the State may remove a child from his home without a warrant. Since no warrant application is ever brought before the court, §78-3a-106(2) does not entitle the child’s parent’s to notice or an opportunity to be heard prior to removal. In short, the State is permitted to use its pre-*Roska* removal procedures, and a parent’s first opportunity to be heard is at the shelter hearing. However, contrary to pre-*Roska* child welfare practice, the State’s decision to remove a child without a warrant must now be supported by facts sufficient to establish “imminent danger” – a much higher threshold than the “substantial danger” test previously applied, and one that can only be met in a small percentage of child welfare cases.

Path 2: The “Hearingless Warrant”

The second category of removal sanctioned by Utah’s post-*Roska* child welfare laws consists of those cases in which the delay required to obtain a warrant is not likely to result in serious harm to the child, but providing the child’s parents with notice and a hearing prior to removal could place the child in immediate risk of harm. In such circumstances, the “exigent circumstances” exception to the Fourth Amendment does not apply, and the State must have a warrant to remove. However, the Fourteenth Amendment’s pre-removal due process protections are excused. This “50-50” approach is appropriate in two limited types of cases: those in which parents are likely to flee the state with their child if advance notice is given of the State’s intent to remove, and those in which, after notice is given to the parent but before a hearing can be held, the parent is likely to punish the child for bringing the alleged abuse or neglect to the attention of the State. Further, given *Roska*’s admonition that a parent’s Fourteenth Amendment rights can only be dispensed with in extraordinary situations (“the mere possibility of danger is not enough to justify removal without appropriate process”), the juvenile courts should excuse the need for pre-removal notice and hearing only in cases where

the State can demonstrate a *likelihood* of serious harm. A DCFS caseworker’s general concerns for the safety of the child, without more, are clearly insufficient to satisfy *Roska*.

Path 3: Warrant and a Hearing Required

Finally, the third type of removal – and the category into which the majority of Utah’s warrant applications fall – consists of those situations where the State can not establish that the child is at imminent risk of significant harm or death (i.e., there exist no exigent circumstances), and where providing a parent with notice and a hearing prior to removal would not create a likelihood of serious harm to the child. In such cases, a parent’s Fourth and Fourteenth Amendment protections remain undiminished, and a child can only be removed (a) pursuant to a warrant, (b) issued by the court after the parent has been provided with notice and an opportunity to be heard.

Adapting to a Post-*Roska* World

Given the relative newness of Utah’s post-*Roska* child removal statutes, it is still too early to determine the full extent to which the new laws will impact child protection practice. However, if Utah’s courts are to comply with the law, the child welfare system must resolve several key issues. Most importantly, the juvenile courts, with the assistance of the Attorney General’s Office, Office of Guardian ad Litem, DCFS, and parents’ counsel, must move quickly to create and implement a uniform system for assessing warrant applications, providing notice to parents and scheduling and holding pre-removal warrant hearings. Obviously, these hearings should be scheduled as soon as possible after DCFS makes the initial determination that a child is in danger. Given the compressed time constraints already attached to child welfare cases, and the high caseloads associated with this area of practice, this will constitute a significant challenge to everyone involved – particularly given the large percentage of cases in which hearings will be necessary.

The juvenile courts must also determine how the new laws can best be reconciled with Utah’s existing shelter hearing requirement. At shelter hearings, the court must order the child released from the State’s custody unless it finds removal was necessary by a *preponderance of the evidence*. See *Utah Code* §78-3a-306(9). If the courts apply a lower standard of proof than this (i.e., probable cause) at pre-removal warrant hearings, they will necessarily have to re-address the issue of original removal under the higher standard at the shelter hearing. Also, while it is uncertain whether a court at a shelter hearing is legally entitled to

take judicial notice of evidence presented at the warrant hearing, it is clear that parents are entitled to present evidence and argument to the court at a shelter hearing. *See* §78-3a-306(5). As a result, current law appears to compel the juvenile court to determine the issue of removal twice within a period of three days – first at the pre-removal warrant hearing, and again at the post-removal shelter hearing.

Other issues must also be addressed and resolved. For instance, given *Utah Code* §78-3a-913's requirement that indigent parents be provided with court-appointed legal counsel "at every stage" of juvenile court custody proceedings, it is likely that court-appointed counsel must be provided at warrant hearings. And in cases where DCFS removes a child without a warrant, or the court issues a warrant without notice and hearing, will parents be allowed to challenge the removal process (in addition to the appropriateness of removal) at a shelter hearing? If so, what remedies will the court apply?

Utah's new removal laws raise a number of challenges, and will demand significant changes in juvenile court practice. It is now up to Utah's juvenile court judges, and the attorneys who practice before them, to ensure that these changes are made.

1. 328 F.3d 1230 (10th Cir. 2003) (*superseding Roska v. Peterson, et al.*, 304 F.3d 982 (10th Cir. 2002)).
2. The Legislature acted to amend Utah law after the original *Roska* decision was issued in September of 2002. While that decision, published at 304 F.3d 982 (10th Cir. 2002), was superseded by the current opinion after a rehearing, the court's Fourth and Fourteenth Amendment analyses in the two opinions are substantively identical.